

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

OVERNITE TRANSPORTATION COMPANY

Employer

and

Case 9-RD-1909

STEPHEN A. WINGERBERG, AN INDIVIDUAL

Petitioner

and

TRUCK DRIVERS, CHAUFFEURS AND HELPERS,  
LOCAL UNION NO. 100, AN AFFILIATE OF THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
AFL-CIO

Union

OVERNITE TRANSPORTATION COMPANY

Employer

and

Case 9-RD-2011

SCOT E. WITSKEN, AN INDIVIDUAL

Petitioner

and

TRUCK DRIVERS, CHAUFFEURS AND HELPERS,  
LOCAL UNION NO. 100, AN AFFILIATE OF THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
AFL-CIO

Union

**REGIONAL DIRECTOR'S DECISION AND**  
**DIRECTION OF ELECTION**

The Employer, Overnite Transportation Company, is engaged in the interstate and intrastate transportation of general commodity freight out of numerous terminals located throughout the United States, including its service center/terminal in Cincinnati,

Ohio, the only facility involved in this proceeding. The Employer currently employs approximately 87 employees at the Cincinnati facility in the certified collective-bargaining unit represented by the Union, Truck Drivers, Chauffeurs and Helpers, Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, AFL-CIO. The Petitioners, Stephen A. Wingerberg and Scot E. Witsken, filed separate petitions with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking an election to decertify the Union as the collective-bargaining representative of the employees in the bargaining unit. A hearing officer of the Board conducted a hearing on July 30, 2002. The parties presented their legal arguments in support of their respective positions on the record and waived the filing of briefs.

The Union asserted at the hearing that because of the Board's blocking charge policy the petitions should not be processed and an election should not be held until the Employer has taken certain remedial actions with respect to several unfair labor practice charges pending before the Board. The Employer and the Petitioners, on the other hand, maintain that there are no pending charges that would affect the bargaining unit at the Cincinnati facility and that the petitions should be processed and an election should be conducted. I have fully considered the record evidence and the positions of the parties and, for the reasons described below, I have decided to direct an election in the certified unit.<sup>1/</sup> To provide a context for those discussion of the issues, I will present the facts and reasoning that supports each of my conclusions.

## **I. BLOCKING CHARGES**

### **A. Position of the Parties**

In support of its position that the petitions should not be processed, the Union specifically relies on: (1) the recent decision issued by the Court of Appeals for the Fourth Circuit ordering the Employer to recognize and bargain with the certified Teamster Locals at the Employer's terminals in Lexington, Kentucky, Bowling Green, Kentucky, Buffalo, New York and Detroit, Michigan; (2) the July 17, 2002 decision issued by Administrative Law Judge Leonard Wagman finding that the Employer, at its Memphis, Tennessee facility, unlawfully discharged eight employees and failed to provide relevant information to Teamster Local 667 regarding the Employer's investigation of bargaining unit employees' criminal records and (3) the unfair labor practice charge filed in Case 18-CA-16118 alleging that the Employer engaged in surface bargaining in connection with national negotiations between the Employer and the International Brotherhood of Teamsters, AFL-CIO that would impact all of the certified bargaining units, including the Cincinnati facility. This charge was dismissed by

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<sup>1/</sup> Consistent with the Board's July 25, 2002 Order Denying Motion to Stay Election in Cases 10-RD-1344 and 10-RD-1369, I will direct that the ballots at this election be impounded, unless the appeal in Case 18-CA-16118 has been resolved. If a determination of the appeal precedes the date of the election, I will consider such decision in determining how to proceed.

Region 18 on April 23, 2002. The dismissal action was appealed by the International Union and the case is currently pending in the General Counsel's Office of Appeals. <sup>2/</sup>

The Employer maintains that its technical refusals to bargain in the units certified in Lexington, Bowling Green, Buffalo and Detroit as well as any alleged unfair labor practices at other locations, including those at the Memphis facility described in the decision issued by Judge Wagman, would not impact on the Cincinnati unit and asserts that the Union has failed to show any causal link between these cases and employee disaffection evidenced by the decertification petitions in Cincinnati. The Employer also points out that a Regional Director has discretion to process a representation petition while review of a dismissal action in a related unfair labor practice case is pending in the Office of Appeals and submits that under the circumstances here, it would be an abuse of discretion if I failed to proceed with the Cincinnati petitions during the pendency of the appeal in Case 18-CA-16118. The Petitioners join the Employer in asserting that an immediate election should be directed in the Cincinnati unit even if the Region were to be required to impound the ballots while awaiting a determination from the Office of Appeals in Case 18-CA-16118.

## **B. Background**

Preliminarily, I note that the petition in Case 9-RD-1909 was filed on September 24, 1999. At the time the petition was filed, there were several pending unfair labor practice charges that either alleged unlawful conduct by the Employer at the Cincinnati facility or on a national basis that would adversely impact the Cincinnati bargaining unit. In accordance with the Board's blocking charge policy, <sup>3/</sup> I held the processing of the petition in abeyance pending the resolution of these charges. On July 2, 2002, because it appeared that all charges directly involving the Cincinnati unit and all national charges that could arguably affect the Cincinnati unit had been resolved, I issued an Order to Show Cause as to why the processing of the petition in Case 9-RD-1909 should not be immediately resumed. <sup>4/</sup>

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<sup>2/</sup> The Union also relies on what it describes as the Employer's past 20-year history of engaging in conduct found to violate the Act in prior Board decisions. Such decisions include unlawful conduct that occurred during the organizing campaigns that resulted in various Teamster Locals, including Local 100 in the unit at issue here, being certified as collective-bargaining representatives of the employees. The Employer maintains that all of the conduct alleged in these cases has been remedied by the Employer, otherwise resolved, or does not impact on the Cincinnati unit.

<sup>3/</sup> The Board's longstanding policy of refusing to process a representation petition applies where the allegations of the charge, if meritorious, would have a tendency to interfere with employee free choice in an election. See *Casehandling Manual Part Two, Representation Proceedings*, Sections 11730-11734.

<sup>4/</sup> The petition in Case 9-RD-2011 was not filed until July 18, 2002.

Both the Union and the Employer responded with position statements concerning the issues raised by the Order to Show Cause. After carefully considering the parties' positions, I issued an Order and Order Consolidating Cases on July 19, 2002 in which I concluded that there was no impediment to processing the petitions in this matter and directed that both petitions should be processed. I note that, except for the purported impact of Judge Wagman's decision which had not yet issued, the responses submitted by the parties to the Order to Show Cause are essentially the same arguments raised by them during the hearing.

### **C. The Decisions of the Court of Appeals for the Fourth Circuit**

On February 11, 2002, the Fourth Circuit Court of Appeals denied enforcement of the Board's Order in *Overnite Transportation Company*, 329 NLRB 990 (1999).<sup>5/</sup> Thereafter, on July 10, 2002, the Board issued Decisions on Review in Cases 10-RD-1344 and 10-RD-1369 and in Cases 20-RD-2293 and 20-RD-2331, respectively, in which it noted that in light of the Fourth Circuit's decision, there were no unremedied unfair labor practices that tainted those decertification petitions. In addition, with respect to Cases 10-RD-1344 and 10-RD-1369, the Board held that a sufficient time for bargaining had taken place. Accordingly, the Board ordered that the petitions be processed.

With respect to the Union's argument that the Fourth Circuit's July 1, 2002 enforcement of the Board's Order in *Overnite Transportation Company*, 333 NLRB No. 62 (2001) should block the processing of the Cincinnati petitions because it requires the Employer to now bargain with the certified Teamster Locals in the units in Lexington, Bowling Green, Buffalo and Detroit, I find no basis on which to conclude that the Employer's refusal to bargain in those units, pending Court review, impacted on the Cincinnati unit. Because the Board's Decisions on Review in Cases 10-RD-1344 and 10-RD-1369 and Cases 20-RD-2293 and 20-RD-2331 were issued after the Fourth Circuit decision, the Board, at least implicitly, found that the test of certification cases did not constitute grounds for continuing to block the processing of the decertification petitions.

Accordingly, I conclude on the basis of the foregoing, that the Fourth Circuit's decisions are not a basis for blocking the processing of the Cincinnati petitions.

### **D. The Decision of Administrative Law Judge Wagman**

Likewise, I conclude that Judge Wagman's decision finding that the Employer engaged in unlawful conduct at its Memphis terminal, even if adopted by the Board, cannot serve to block the processing of the Cincinnati petitions. The unlawful conduct in that case occurred at a location separate and apart from the Cincinnati unit and there is no showing that this conduct caused employee disaffection in Cincinnati or undermined the Union's support among unit employees. In reaching this decision, I

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<sup>5/</sup> The Board's Order in this case was national in scope, requiring the Employer to take some remedial action in all of the certified bargaining units.

note that on July 25, 2002, the Board issued an Order denying Teamster Local Union No. 402's Motion to Stay Election with the respect to the decertification election scheduled in Cases 10-RD-1344 and 10-RD-1369, while holding that Local 402's Motion to Reconsider the Board's July 10, 2002 Decision on Review remains under consideration by the Board. Moreover, the Board refused to stay the election even though the Wagman decision had issued and the International Union specifically raised this decision in its arguments to the Board to stay the election in these cases.

#### **E. The Unfair Labor Practice Charge in Case 18-CA-16118**

Further, as described above, the Board issued its July 25, 2002 Order denying Local 402's motion to stay the decertification election in Cases 10-RD-1344 and 10-RD-1369 even though the dismissal of the charge in Case 18-CA-16118 was pending in the Office of Appeals. Accordingly, I find that it is appropriate to proceed to an election on the Cincinnati petitions, notwithstanding the fact that the unfair labor practice charge in Case 18-CA-16118 remains under consideration by the Office of Appeals.

### **II. THE APPROPRIATE UNIT**

The parties stipulated and I find that the Union was certified on July 18, 1997 as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time over-the-road drivers, city pickup and delivery drivers, dock employees, hostlers, the overage, shortage and damage clerk (OS&D clerk), and leadmen employed by the Employer at its Cincinnati, Ohio facility, excluding all office clerical employees, mechanics, the parts shop employee, and all professional employees, guards and supervisors as defined in the Act.

The parties also stipulated, and I find, that there is no collective-bargaining agreement in effect between the parties covering the employees in the Unit and no contract bar to this proceeding.

Finally, the parties stipulated, and I find that the following individuals have the authority to hire and/or discharge employees and are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the Unit: Chris Timo, Service Center Manager; Jim Cox, Assistant Service Center Manager; Gail Christman, Office Manager; Randy Calloway and Dave Elliston, Dock Supervisors; Bill Steele, Road Supervisor and Steve Meeks, City Supervisor.

### **III. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time over-the-road drivers, city pickup and delivery drivers, dock employees, hostlers, the overage, shortage and damage clerk (OS&D clerk), and leadmen employed by the Employer at its Cincinnati, Ohio facility, excluding all office clerical employees, mechanics, the parts shop employee, and all professional employees, guards and supervisors as defined in the Act.

#### **IV. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Truck Drivers, Chauffeurs and Helpers, Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, AFL-CIO**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

##### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **August 13, 2002**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish a total of **four** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

## **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## **V. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C.

20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **August 20, 2002**. The request may **not** be filed by facsimile.

Dated: August 6, 2002

/s/ Richard L. Ahearn  
Richard L. Ahearn, Regional Director  
National Labor Relations Board  
Region 9

**Classification Index**

347-6020-5033